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No. 81-38

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD, a minor, etc., et al.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

GEORGE DEUKMEJIAN
Attorney General

WILLARD A. SHANK
Chief Assistant Attorney General

RICHARD D. MARTLAND
Assistant Attorney General

GEOFFREY L. GRAYBILL
Deputy Attorney General

555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-6221

Counsel for State of California as Amicus Curiae in Support of Respondent

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BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE STATE OF CALIFORNIA

The matter under review challenges the constitutionality of article I, section 7(a), of the California Constitution. This brief amicus curiae in support of respondent is submitted pursuant to rule 36.4 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Court is being asked to invalidate an amendment to the California Constitution (known as Proposition 1)

which was adopted by an overwhelming, almost two to one, margin of the people of California who voted in the November 1979 election. The context of the request is review of a decision of the California Court of Appeal reported at 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) which upheld the validity of Proposition 1 against petitioners' challenge that it violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The central thesis of this challenge to the constitutionality of Proposition 1 is that it purportedly imposes restrictions on the availability of state judicial remedies "only where the wrong complained of involves racial separation or isolation—segregation of students by race in the public schools" [1] and is therefore a racial classification prohibited by the Fourteenth Amendment unless necessary to fulfill a compelling state interest. Petitioners contend that this purported disparate racial impact of Proposition 1 necessarily triggers a searching inquiry into whether an invidious discriminatory purpose was a factor motivating enactment of the constitutional amendment and that such an inquiry inevitably demonstrates that there was such a prohibited and invalidating purpose.[2]

It is not the purpose of this brief submitted as amicus curiae in support of respondent to duplicate the argument of respondent on the merits as set forth and previewed in its opposition to the petition for writ of

[1] Petitioners' Brief on the merits (Pets'. Br.) page 42.
[2] (Pets'. Br., pp. 64–98.)

certiorari. The purpose is to fully support respondent's argument and supplement it with perspective on the context in which Proposition 1 was enacted and on the vital interests of California which it promotes. In attempting to fulfill this objective, certain manifestations of petitioners' misapprehension of California law will be corrected.

Petitioners' most basic misapprehension of Proposition 1 and its effect is reflected in their definition of a prohibited racial classification upon which their entire attack on the validity Proposition 1 is based. Their definition requires that previous holdings of this Court in effect be modified if not overruled. The Court has repeatedly held that (*Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 531, n. 5 (1979)) (*Dayton II*):

> "Racial imbalance, we noted in *Dayton I,* is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment. 433 U.S, at 413–414."

By its very terms Proposition 1 has no effect whatsoever where a state court order mandating pupil school assignments or pupil transportation is required by the Fourteenth Amendment. The California Court of Appeal so held (113 Cal.App.3d at 656; 170 Cal.Rptr. 510.):

> ". . . In requiring that remedial aspects of the duty to desegregate conform to the requirements of the Fourteenth Amendment as interpreted by decisions of the United States Supreme Court, it [Proposition 1] merely provides a more precise contour to the

duty established by California law and court decisions to desegregate public schools regardless of cause. (Cf. *Brown* v. *Califano* (D.C. Cir. 1980) 627 F.2d 1221.)" (Clarification added.)

Moreover, nothing in Proposition 1 or the opinion of the California Court of Appeal necessarily limits its effect solely to utilization of pupil school assignments or pupil transportation to desegregate the public schools. Contrary to petitioners' contention, nothing in California law requires such an interpretation and petitioner cites no California authority which makes such an interpretation.

Overruling or limiting *Dayton* in the context of this case is particularly unwarranted. Proposition 1 leaves petitioners completely free and equal with persons of all other racial heritages to participate in the elections for and deliberations of local school boards to effectuate utilization of pupil school assignments and pupil transportation in ways which they deem desirable despite such procedures not being required by the Fourteenth Amendment. Petitioners do not contend that the Fourteenth Amendment requires utilization of pupil transportation or pupil assignment to enforce their rights thereunder in the underlying school desegregation action. Absent such a requirement, which is fully accommodated by Proposition 1, the political and legislative processes are best suited to resolve the difficult economic and social dilemmas inherent in use of pupil transportation and pupil assignment for any purpose.

Use of pupil school assignments and pupil transportation can be enormously expensive tools in implementing

educational programs even where they are necessary incidents thereto. Whether there are any educational benefits from use of pupil school assignments and pupil transportation for the exclusive purpose of maintaining racial balance in the schools or whether any such benefits outweigh the resulting loss of other beneficial aspects of an education program are open questions and strong reasons to doubt that these questions will ultimately be resolved in the affirmative are widely recognized.

Resolution of or adjustment to these economic and social dilemmas by the democratic political process is the constitutionally authorized method of redressing grievances for which no remedy is mandated by the Constitution. Yet, if petitioners' theory of prohibited racial classification is accepted, their particular theories of social good, which are not mandated by the United States Constitution, would be immune from testing in the democratic political process. Such a result would be unprecedented and would undercut any concept that constitutional adjudication is subject to neutral application of constitutional principles. The deleterious effect of such preemption of the electoral process on public confidence in the future of democratic political participation in allocation of scarce public resources would undoubtably be significant.

A state's interest in assigning authority within its governmental structure is fundamental to its sovereignty within the federal system established by the United States Constitution. Proposition 1 clarifies the distribu-

tion of power within California's governmental structure to allocate public resources associated with pupil transportation and pupil school assignment. Where the authority of the state judiciary under the state constitution is being clarified, there is no means independent of the judiciary to accomplish the clarification except, as manifested by Proposition 1, through amendment of the Constitution.

In the unprecedented event it should be determined that the clarification of power manifested by Proposition 1, which fully accommodates rights provided by the Fourteenth Amendment, constitutes a racial classification, the clarification is justified as necessary to serve a fundamental and compelling state interest.

ARGUMENT

I

PROPOSITION 1 DOES NOT CONSTITUTE AN IMPERMISSIBLE RACIAL CLASSIFICATION

A. Proposition 1 Is An Exercise Of State Sovereignty Recognized By The United States Constitution To Be Of Overriding Significance

Petitioners contend that the doctrine of *Hunter* v. *Erickson*, 393 U.S. 385 (1969) renders Proposition 1 a racial classification prohibited by the Fourteenth Amendment.[3] The basis for this contention is that Proposition 1 restricts the authority of California courts to order pupil school assignments and pupil transportation to those situations where these remedies are re-

[3] Pets'. Br., p. 49.

quired under federal law to correct a violation of the Fourteenth Amendment; whereas before enactment of Proposition 1 these remedies were available to vindicate rights of racial minorities provided under the State constitution but not provided under federal law.[4]

However, this Court expressly noted in *Hunter* v. *Erickson, supra*, 393 U.S. at pages 389–390 and n. 5, that it was not holding repeal of an ordinance which provided relief from racial discrimination to be a violation of the Fourteenth Amendment. In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531, n. 5 (1979) (*Dayton II*), reaffirming and clarifying *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413–414 (1977) (*Dayton I*) it was held that repeal of policies promoting desegregation is unconstitutional only if such actions were required in the first place by the Fourteenth Amendment. It is undisputed that Proposition 1 by its very terms, as the California Court of Appeal recognized, authorizes California courts to order pupil school assignments and pupil transportation as required by federal case law to remedy violations of the Fourteenth Amendment. (113 Cal.App.3d at 656; 170 Cal.Rptr. 510.)

Thus, even if California had eliminated its state constitutional mandate that "local school boards have an affirmative obligation to take reasonably feasible steps to alleviate school segregation, whatever is causes,"[5] there would have been no violation of the Fourteenth Amend-

[4] Pets'. Br., p. 32.

[5] *Crawford* v. *Board of Education*, 17 Cal.3d 280, 293; 130 Cal.Rptr. 724, 731; 551 P.2d 28, 35 (1976) (*Crawford I*).

ment so long as California governmental entities were not precluded from remedying violations of the Fourteenth Amendment. *A fortiorari*, Proposition 1 does not constitute a violation of the Fourteenth Amendment by merely restricting the circumstances in which a state court may use certain remedies to those which constitute violations of the Fourteenth Amendment while leaving many other remedies [6] available to alleviate racial imbalance in the schools regardless of whether such imbalance constitutes a violation of the Fourteenth Amendment.

There are vitally important policy considerations which demonstrate the wisdom of this Court's holdings in *Hunter* v. *Erickson* and *Dayton I and II.* First, from the view of petitioners' own self interest, a rule such as they are urging the Court to adopt, which made state authorized or mandated efforts to encourage racial integration in various aspects of social, political and economic life, in effect, immutable and perpetually exempt from the political process, could actually create an otherwise nonexistent obstacle to and discourage the adoption of such policies. Moreover, such a rule, especially in the context of this case, would intrude into an area of state sovereignty repeatedly recognized by this Court as consistent with and inherent in the constitutional structure of federalism.

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[6] Widely recognized remedies in addition to pupil school assignment and pupil transportation are indentified in *Crawford I* (17 Cal.3d at 305–306; 130 Cal.Rptr. at 740–741; 551 P.2d at 44–45) and *Crawford II* (113 Cal.App.3d at p. 649; 170 Cal.Rptr. at 505).

Proposition 1 expressly recognizes that local school boards [7] have unfettered authority to use pupil school assignments and pupil transportation to achieve racial balance in their schools even in the absence of a Fourteenth Amendment mandate to do so.[8] In effect, Proposition 1 clarified the distribution of authority within the governmental structure established by the California Constitution to commit public resources to the inherently expensive [9] processes of pupil school assignments and pupil transportation. The local school boards continue to have all the authority in this regard that they had before adoption of Proposition 1. The authority of the state's judiciary to order utilization of pupil school as-

[7] Within the California governmental structure it is only the local school boards which have the responsibility and authority to take the actions needed to fulfill the state constitutional mandate to take reasonably feasible steps to eliminate racial segregation in the schools. (See *Santa Barbara School District* v. *Superior Court*, 13 Cal.3d 315, 329; 118 Cal.Rptr. 637, 648; 530 P.2d 605, 616 (1975).)

[8] California Constitution, Article I, Section 7(a) provides in pertinent part:

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended."

[9] See *Keyes* v. *School District No. One, Denver, Colorado*, 413 U.S. 189, 247–248 (1973) (Powell, J. concurring and dissenting); see also *Equal Educational Opportunity*—1971: *Hearings before the Select Committee on Equal Educational Opportunity of the United States Senate*, 92d Cong., 1st sess. (1971), part 18, pages 9008–9013, 9023, 9026, 9198–9199; *School Busing: Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives*, 92d Cong. 2d sess. (1972), parts 1–3, pages 277–280, 751, 861, 904–905, 1573–1577, 1602; *Busing of School Children: Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate*, 83d Cong., 2d sess. (1974), pages 30, 99, 104, 256–258, 275.

signments and pupil transportation is limited to the requirements under federal case law to remedy specific violations of the Fourteenth Amendment.[10]

This Court has repeatedly recognized that "[t]he Constitution does not impose on the states any particular plan for the distribution of governmental powers" and that a state has sovereign authority to distribute such power in any way it sees fit. (*Mayor* v. *Educational Equality League*, 415 U.S. 605, 615, n. 13 (1974); see also *James* v. *Valtierra*, 402 U.S. 137, 141–143 (1971).)[11] Morever, even where racial discrimination has been

[10] California Constitution, Article II, Section 7(a), provides in pertinent part:

". . . no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution."

[11] See also *East Lake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) ("Under our constitutional assumptions all power derives from the people who can delegate it to representative instruments which they create. See, e.g., The Federalist No. 39 (J. Madison)."); *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of govenment as they will between their legislative and judicial branches"); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (Warren, C. J., announcing judgment), 256–257 (Frankfurter, J., concurring), 268 (1957) (Clark, J., dissenting).

proven to be implicated in such a distribution of governmental power through its exercise in a particular instance by the designated governmental body or official,[12] this Court has suggested that invalidation of the distribution of authority as part of a federal remedy raises "delicate issues of federal-state relationships." (*Id.*, at pp. 615–616, citing *Carter* v. *Jury Comm'n of Greene County*, 396 U.S. 320, 338 (1970).)

In light of the *Dayton I and II* holding that exercise of a delegated power by state agencies or officials so as to revise policy which had been perceived as beneficial to a racial minority is not prohibited so long as the original policy was not required by the Fourteenth Amendment,[13] there could be no showing of disproportionate impact or other prohibited effect on racial minorities resulting from enactment of Proposition 1 which would override the state's sovereign right to distribute power within its constitutionally mandated governmental structure. The distribution of power manifested in Proposition 1 cannot be invalid because it leaves both state courts and local school boards with complete authority to use pupil school assignments and pupil trans-

[12] Petitioners do not contend that the finding by the Court of Appeal that the racial imbalance in respondent's schools was not the result of a violation of the Fourteenth Amendment (113 Cal. App.3d at 649; 170 Cal.Rptr. at 505) is in error. Thus, the particular application of Proposition 1 to this case is not at issue.

[13] Cf. *Hughes* v. *Superior Court*, *supra*, 339 U.S. 460, 466, wherein this Court held that a California injunction issued against picketing in support of preferential hiring of blacks as distinguished from picketing to protest racial discrimination did not constitute a violation of the Due Process Clause of the Fourteenth Amendment.

portation to remedy any violation of the Fourteenth Amendment.

The overriding significance of a state's right to distribute power within its governmental structure is acutely demonstrated in the context of Proposition 1. The purposes which the distribution of power reflected in Proposition 1 is designed to serve are set forth in its text:

> "In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

In addition to promoting the widely recognized strong state interest in maximizing local control of schools (see *Milliken* v. *Bradley,* 418 U.S. 717, 741–743 (1974)), Proposition 1 obviously responds to and adjusts for the policy directives mandated by an initiative measure adopted by the people on June 6, 1978, adding article XIII A to the California Constitution to limit taxation on real property (the amendment is known throughout the country as "Proposition 13"). Inasmuch as property tax revenues are a major source of funding for local governments and school districts, the limiting effect of Proposition 13 on the budgetary options and the inextricably

related program and policy options for local governments and school boards was immediate. (See *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization,* 22 Cal.3d 208, 225; 149 Cal.Rptr. 239, 245; 583 P.2d 1281, 1287 (1978).) The bill to refer Proposition 1 to a vote of the people for adoption as an amendment to the California Constitution pursuant to article XVIII, section 1, thereof was introduced in the California Legislature as Senate Constitutional Amendment No. 2 on December 4, 1978.[14]

The clarification by Proposition 1 of the distribution of power to allocate the substantial resources inherent in implementation of educational policy through pupil school assignments and pupil transportation among competing priorities where not needed to remedy violations of the Fourteenth Amendment is an exercise of state sovereignty which is absolutely essential to the orderly functioning of its government according to its legitimate priorities. (See *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 33–55 (1973) and *Serrano* v. *Priest,* 18 Cal.3d 728, 761–775; 135 Cal.Rptr. 345, 363–373; 557 P.2d 929, 947–957 (1976).) Confusion and uncertainty inherent in the California Supreme Court's rulings regarding when state courts are justified in making such allocations [15]

[14] See Senate Final History, 1979–80 Regular Session of the California Legislature, page 1174.

[15] In *Crawford I* the California Supreme Court articulated in general and equivocal terms the standards for ascertaining whether a school board is fulfilling its state constitutional obligation to "undertake reasonably feasible steps to alleviate school segregation, regardless of the cause of such segregation" (17 Cal.3d at 302; 130 Cal.Rptr. 724, 738; 551 P.2d 28, 42) and if it is not fulfilling its obligation, for determining what action is appropriate for the

and pending fiscal uncertainties and limitations in the

state trial courts to take. (*Id.*, at 302–320; 724–738; 28–42.)

A school is not segregated simply because the composition of the student body is imbalanced, i.e., does not "reflect the racial composition of the district as a whole," rather prohibited segregation exists in a school only where "minority enrollment is so disproportionate as realistically to isolate minority students from other students." (*Id.*, at 302–304; 738–740; 42–44.)

If schools within a school board's jurisdiction are segregated according to these criteria, the board has an obligation to choose among "virtually scores of administrative techniques for facilitating the desegregation of school systems" giving consideration "to the various factors in each case, including the practical necessities of governmental operation [quoting *Jackson* v. *Pasadena City School Dist.*, 59 Cal.2d 876, 882; 31 Cal.Rptr. 606; 382 P.2d 878, 882 (1963).]" (*Id.*, at 304–305; 739–741; 43–45.)

State courts are directed not to intrude into a school board's administration of its district even if there are "segregated" schools so long as the board has initiated, is implementing and making meaningful progress pursuant to, "reasonably feasible steps" to alleviate segregation and its harmful consequences. (*Id.*, at 305–306; 740–741; 44–45.) Intervention by a court is not justified solely because it believes that a plan different than that employed by a board will produce more rapid desegregation because such intervention has "all too often ultimately failed to result in desegregated education." (*Id.*, at 306; 741; 45.) (See also *Estes* v. *Metropolitan Branches, Dallas NAACP*, 444 U.S. 437, 450–451 (1980) (Powell, J. dissenting from dismissal of writs of certiorari as improvidently granted) quoted in *Crawford II*, *supra*, 113 Cal.App.3d at 655; 170 Cal.Rptr. at 509).)

In the event a board is not fulfilling its constitutional obligations, the trial court must follow certain guidelines in devising remedies: (1) the objective is not statistical balance among races but elimination of the harms to minority children resulting from segregated education; (2) the costs in both economic and educational terms of the alternative approaches must be weighed; (3) plans which are likely to result in a "one race" school district must be rejected; (4) alternatives which are not realistically available or involve goals which are not realistically attainable must be rejected and greater efforts in another more productive direction should be taken. (*Id.*, at 308–209; 742–743; 46–47.)

It is apparent that the Court of Appeal did not believe that the trial court correctly applied the California Supreme Court's guidelines. (113 Cal.App.3d at 642, 648–649; 170 Cal.Rptr. at 504.) On remand a new trial judge seems to have reached the same conclusion. (See Opp. to Pet. for Cert., pp. 7–8 and Pets.' Br., p. 75, n. 41.)

context of Proposition 13 [16] created the felt necessity for Proposition 1 which is reflected in its statement of purpose and in each of its provisions.

Petitioners' ultimate rationale for invalidating Proposition 1 would turn *Hunter* v. *Erickson* on its head. The members of local school boards are generally elected in California (see Cal. Ed. Code, § 35010 et seq.) and are therefore subject to recall pursuant to California Constitution, article II, sections 13 and 19, and California Elections Code section 27000 et seq.[17] Petitioners do not contend that they are precluded from, or uniquely burdened in some way on the basis of race in, exercising the right to equal opportunity to participate in the political and legislative process of the school district.

Nevertheless, the result which petitioners see as inherent in any ruling invalidating Proposition 1 is preclu-

[16] The urgency for clarification could only have been enhanced by an initiative measure to add article XIII B to the California Constitution which was adopted by the people at the same election pursuant to California Constitution article XVIII, section 3, on November 6, 1979, in which Proposition 1 was enacted. (See Cal. Stats. 1979, vol. 1, pp. A-173–A-179.) Article XIII B establishes spending limitations on both state and local governments. Such a provision limits the ability of the state to make up the revenue shortfall to local governments and school districts resulting from Proposition 13. (See, e.g., *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal.3d at 226–227; 149 Cal.Rptr. at 245–246; 583 P.2d at 1287–1288.) Indeed local governments are complaining that the state is not meeting its obligation under section 6 of article XIII B to provide local governments with the funds to support new programs which the state has allegedly required them to implement. (*County of Contra Costa et al.* v. *State of California,* Superior Court for the County of Sacramento No. 300784, Complaint for Declaratory Relief, filed Jan. 11, 1982.)

[17] Petitioners also have equal access to and opportunity to influence school boards. (See Cal. Gov. Code, § 54950 et seq.)

sion of that political and legislative process from weighing the priority of pupil school assignment and pupil transportation against any other educational priority including other means of achieving school desegregation or alleviating the effects of racially isolated schools, only when they are proposed, but not required by the Fourteenth Amendment, to desegregate minority schools.[18] (Pets'. Br., p. 59, n. 33.)

The reason for invalidation of the Akron City Charter Amendment at issue in *Hunter* v. *Erickson* as a denial of equal protection of the law was that it placed "special burdens on racial minorities within the governmental process" by requiring a referendum only on housing legislation which had the effect of eliminating discrimination in housing based on race. (393 U.S. at pp. 390–391.) Proposition 1 imposes no obstacle whatsoever to

[18] Establishing an exemption for use of pupil school assignments and pupil transportation not required by the Fourteenth Amendment from the competition in the political and legislative process with other claims on scarce funding available for public schools would be especially inappropriate in the light of serious questions which have been raised about whether these devices actually promote rather than reduce racial isolation in the public schools. (See *Estes* v. *Metropolitan Branches, Dallas, supra,* 444 U.S. at pp. 448–451 (Powell, J., dissenting.)

Apparently, there is also reason to believe that racial integration of schools, in itself, cannot be expected to result in significant improvement in the academic performance of students from previously racially isolated schools. (See "Educational Inequality: Race Is Not The Problem," William D. Rohwer, Jr., reprinted in *Integrateducation,* March–April 1975, vol. XIII, #2, pp. 3–9; see also, Orfield, "School integration and its Critics", 5 Civil Rights Digest, Summer 1973, p.5 ("We now know that substantial differences remain between middle class white children and poor white, black, Chicano, and Indian children, even when they learn in integrated classrooms. The gaps in test scores remain large and serious.")

complete and equal access for members of any racial group to the legislative and political process through which utilization of pupil school assignment and pupil transportation to achieve racial balance not required by the Fourteenth Amendment can be effected. Such was not the case in: *Lee* v. *Nyquist*, 318 F.Supp. 710, 719 (W.D.N.Y. 1970), aff'd., 402 U.S. 935 (1972) (prohibited certain school boards from implementing school desegregation even if required by the Fourteenth Amendment); *Reitman* v. *Mulkey*, 387 U.S. 369, 377 (1967) (eliminated access to any level of state government to redress racial discrimination in housing).

Obviously, petitioners do not seek what they already have, i.e., complete and equal access to the legislative process in school districts; rather by virtue of their identity as members of a minority racial group they seek, through invalidation of Proposition 1, a privileged status whereby their particular theories of social good, which are not mandated by the United States Constitution, would be immune from testing in the democratic political process. In the absence of necessity to remedy violations of the United States Constitution, no such privileged political status has ever been considered to be a mandate of the United States Constitution. (Cf. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 166–167 (1977) and *James* v. *Valtierra, supra*, 402 U.S. at 141–143.)

Thus, this Court should reject petitioners' efforts to invalidate Proposition 1 by converting *Hunter* v. *Erickson* from a shield against racial discrimination in the

political process into a sword to preempt participation of all other citizens, including other persons of the same racial heritage,[19] who may disagree with them, in the political process of deciding the desirability and priority of petitioners' particular cause.

B. Proposition 1 Does Not Constitute A Racial Classification

Petitioners acknowledge, as its language requires, that Proposition 1 prohibits state courts in terms of general application from ordering pupil school assignments or pupil transportation except as required by the United States Constitution. (Pets'. Br. p. 37.) Nevertheless, petitioners insist that Proposition 1 be construed to apply only to pupil assignments and transportation for the purpose desegregating public schools. (Pets'. Br., pp. 35–48.) This insistence is essential to their theory of the invalidity of Proposition 1. The premises upon which this insistence is based are unjustified on their face or as interpretations of California law.

It is obvious that the construction by the Court of Appeal of the effect and validity of Proposition 1 in the

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[19] Several black leaders in California have been quoted as disagreeing with petitioners' priorities (Black Enterprise, "Turning Back the Bus", June, 1981, p. 48):

> " . . . the state's first black Assembly Speaker, Willie L. Brown, . . . says elected officials should stop defending busing and ignore it as a campaign issue. Although 'busing never has been an issue in the black community, it has been as far as black leadership is concerned[.]' "

Similarly, it was reported that black Assemblywoman Maxine Waters, urged black parents to "mobilize and show concern for improving the curriculum while motivating students to learn, and pushing for sorely needed funds to reduce class sizes and upgrade inferior schools in black areas." (id.)

context of a school desegregation case as removing "court-ordered public school assignment and transportation as a remedy available to cure state-proscribed racial imbalance in public schools" [20] is not the same as stating that Proposition 1 removes state court authority to order pupil transportation and pupil school assignments *only* where proposed for use as a remedy for racial imbalance in the public schools and does not remove such authority in the myriad of other contexts where such remedies have been used.[21] Despite their contention that the former statement is an authoritative holding [22] on the meaning of Proposition 1 to the effect of the latter statement and therefore binding on this Court (Pets'. Br., at pp. 35–37, n. 16), petitioners tacitly acknowledge the logical fallacy of the equation by inviting this Court to deduce their preferred construction independently of this California "authority". (Pets'. Br., at pp. 37–48)

A fundamental principle of statutory construction in California is that where the language of a statute has unequivocal meaning, the provision will be applied according to its terms without further judicial construction (*In re Andrews*, 18 Cal.3d 208, 212–213; 133 Cal.Rptr. 365,

[20] *Crawford II*, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508 quoted in Pets'. Br., at pp. 35–36.

[21] Petitioners acknowledge the many other contexts in which the remedy can be used. Pets'. Br., n. 25, pp. 45–46.

[22] Since no context other than school desegregation is even mentioned in *Crawford II*, had the court held as petitioners suggest, the holding would not be binding on other California courts. (See *Ball* v. *Rodgers*, 187 Cal.App.2d 442, 449–450; 9 Cal.Rptr. 666, 670 (1960).

367; 555 P.2d 97, 99 (1976).)[23] Moreover, if a statute can be construed in a manner which avoids a constitutional infirmity it should be so construed. (*San Francisco Unified School Dist.* v. *Johnson,* 3 Cal.3d 937, 942; 92 Cal.Rptr. 309, 310–311; 479 P.2d 669, 670–671 (1971).)[24]

The official title and summary of Proposition 1 prepared by the California Attorney General appeared in the ballot pamphlet distributed by the California Secretary of State prior to the election held on November 7, 1979,[25] and on the ballot for that election.[26] That official title and summary faithfully reflects the fact that the terms of Proposition 1 are not limited to the use of pupil school assignment or transportation for the purpose of desegregating public schools.[27]

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[23] Accord *Friends of Mammoth* v. *Board of Supervisors,* 8 Cal.3d 247, 256; 104 Cal.Rptr. 761, 766; 502 P.2d 1049, 1054 (1972).

[24] Accord *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal. 3d at 239–242, 245; 149 Cal.Rptr. 15 254–256, 257; 583 P.2d at 1296–1298, 1299.

[25] J.A. 257–258.

[26] California Elections Code sections 3530–3533. A shorter version of the title and summary appears on voting machine labels. Elections Code sections 10301 and 10302.

[27] The fact that Proposition 1 is neutral in its limitation on judicial use of pupil transportation and pupil assignments apparently created confusion among those opponents and proponents of the measure alike who were primarily concerned with its effect, if any, on compulsory school busing. J.A. 271–274. The Attorney General obviously was not interpreting Proposition 1 in his press release. J.A. 280–281. If anything these circumstances demonstrate Proposition 1's lack of limitation of judicial use of pupil transportation and assignment for school desegregation purposes only. Moreover, the expressed clarification in Proposition 1 regarding its lack of limitation on the authority of school boards to use pupil transportation and assignment has no relevance or relationship to its patent comprehensive limitation on the authority of the state judiciary to order use of these devices. It is the limitation on the authority of the courts that is challenged by petitioners. Pets'. Br., p. 48.

Thus, the terms of Proposition 1 clearly contradict petitioners' preferred construction that it applies only to a state court's pupil transportation and assignment to achieve racial balance in the public schools.

C. Proposition 1 Does Not Impose Special Burdens On Racial Minorities

Ignoring the fact none of them applied to petitioners, they contend or imply that certain features of Proposition 1 are unique to it and therefore impose special burdens.

Petitioners contend Proposition 1 is unique because it authorizes "any interested person" to request modification of a court order which does not comply with its terms. (Pets'. Br., pp. 44, 87.) However, California law provided authority for such action prior to enactment of Proposition 1. Moreover, petitioners were not affected by this provision.[28]

The term "any interested person" had legal significance before enactment of Proposition 1 in the context for which it is used therein.[29] In California it is presumed that where a new law uses terms similar to those given meaning in preexisting judicial constructions, the draft-

[28] Opposition to Petition for Certiorari, pages 19–20; *Crawford II*, 113 Cal.App.3d at 636; 170 Cal.Rptr. at 370.

[29] Petitioners contend that the California Legislative Analyst's analysis of Proposition 1 authoritatively interpreted "any interested person" to mean "any person" thereby treating the word "interested" as mere surplusage. (Pets'. Br., p. 87.) This interpretation violates a fundamental principle of statutory construction whereby every word of a statute, especially those with preexisting legal significance, is to be given effect. (See *People* v. *Gilbert*, 1 Cal. 3d 475, 480; 82 Cal.Rptr. 724, 728; 462 P.2d 580, 584 (1969).) The Legislative Analyst is an employee of the Legislature whose function is to provide budgetary and fiscal, not legal, analysis. (See Cal. Gov. Code, §§ 9140, 9143.)

ers of the new law were familiar with these constructions and intended that the new law be interpreted accordingly. (See *Bishop* v. *City of San Jose,* 1 Cal.3d 56, 65; 81 Cal. Rptr. 465, 471; 460 P.2d 137, 143 (1969) and *People* v. *Curtis,* 70 Cal.2d 347, 355; 74 Cal.Rptr. 713, 718; 450 P.2d 33, 38 (1969).)

In the course of holding that any person, whether or not a party to the original action, who is "aggrieved" by a judgment may appeal, the California Supreme Court stated that (*County of Alameda* v. *Carleson,* 5 Cal.3d 730, 736–737; 97 Cal.Rptr. 385, 389–390; 488 P.2d 953, 957–958 (1971)):

> "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations omitted.] Appellants' interest 'must be immediate, pecuniary, and substantial, and not nominal or a remote consequence of the judgment.' [Citation omitted.]"

The concept of "interested person" in the context of school desegregation cases has been given definition in *Bustop* v. *Superior Court,* 69 Cal.App.3d 66; 137 Cal.Rptr. 793 (1977) (parents of children attending schools of defendant school district who oppose position of plaintiffs).[30] It is apparent that such persons could appeal any judgment adverse to their interests pursuant to *County of Alameda* v. *Carleson, supra,* before Proposition 1 was enacted. It is also apparent from *Bustop* that prior to enactment of Proposition 1 these "interested

[30] Accord *Johnson* v. *San Francisco Unified School District,* 500 F.2d 349, 353–354 (9th Cir. 1974).

persons," even though not parties to the action, could at any time petition a court for modification of any injunction mandating pupil transportation and pupil assignments.

In California a final, permanent injunction may be dissolved or modified any time there is a change in the law affecting the validity of the injunction, or in the facts upon which the injunction was justified or when the ends of justice would be served thereby. (*Sontag Chain Stores Co.* v. *Superior Court,* 18 Cal.2d 92, 94–95; 113 P.2d 689, 690 (1941).) Persons affected by the injunction would have standing to seek such modification. (Cf. *Ross* v. *Superior Court,* 19 Cal.3d 899, 906; 141 Cal.Rptr. 133, 137; 569 P.2d 727, 731 (1977) and *Berkeley Lawn Bowling Club* v. *City of Berkeley,* 42 Cal. App.3d 280, 291; 116 Cal.Rptr. 762, 770 (1974).)

Although it had no effect on them for the same reasons that the modification provision did not affect them, petitioners suggest providing precedence over other civil court actions for an action seeking modification pursuant to Proposition 1 is also unfair. (Pets.' Br., p. 87, fn. 50.) They acknowledge however that providing such precedence is not unique to Proposition 1. Most declaratory relief actions are entitled to precedence. (Cal. Code of Civ. Proc., § 1062(a).)

Obviously, it is of great urgency that a school board and its constituents be informed as to whether funds committed by court order remain an uncontrollable aspect of the district budget or are available for other pressing priorities. In other circumstances where sub-

stantial amounts of money are tied up and unavailable for other immediate claims on its use, such precedence has been provided. (See, e.g., Cal. Gov. Code. § 14355.

Petitioners contend that enactment of Proposition 1 at a special election is unique and sinister. (Pets'. Br., p. 84.) However, special elections for this purpose are authorized by California Constitution article II, sections 8(c) and 9(c). Moreover, there were three other measures on the same special election ballot.[31]

Thus, the terms of Proposition 1 and their relationship to preexisting California law provide no basis for concluding that it constitutes a racial classification.

II

PROPOSITION 1 IS NOT TAINTED BY ANY INTENT TO DISCRIMINATE AGAINST A RACIAL MINORITY

As an alternative to their argument based on *Hunter* v. *Erickson* that Proposition 1 is unconstitutional as a racial classification, petitioners appear to contend that even if the former argument is rejected, Proposition 1 is invalid under *Arlington Heights* v. *Metropolitan Housing Corporation*, 429 U.S. 252 (1977) because it should be inferred that racial animus was a motivating factor in its enactment. (Pets'. Br., pp. 64–69.)

The California Court of Appeal held that petitioners had not established that race was a motivating factor in enactment of Proposition 1 and that Proposition 1 would have been enacted in any event. The findings of the

[31] California Statutes 1979, volume 1, page A-173.

Court below are correct and should be upheld.

Moreover, an inquiry into the motivations of the California Legislature and electorate in enacting Proposition 1 is unwarranted and constitutionally irrelevant because Proposition 1 has no disproportionate impact on the ability of any racial minority to participate in the political process.

A. The Finding By The California Court Of Appeal That Enactment Of Proposition 1 Was Not Motivated By An Intent To Discriminate Against A Racial Minority Is Correct

The Court of Appeals concluded that none of the evidence presented by petitioners was sufficient in isolation or in cumulative effect to support an inference that the intent to effect racial segregation or discriminatory purpose was a motivating factor in enactment of Proposition 1. (113 Cal.App.3d at 654–656; 170 Cal.Rptr. 569–570.)

Moreover, the court held that the effects of Proposition 1 are consistent with the purposes noted in its text and that none of petitioners' evidence demonstrated that its recitation of purpose is less than comprehensive. (*Id.*) Thus, it is apparent that the court below believed that Proposition 1 would have been enacted even in the absence of any racial animus posited by petitioners. (See *Arlington Heights, supra,* 429 U.S. at 270, n. 21.)

Just as in *Reitman* v. *Mulkey, supra,* 387 U.S. at 378–379 this Court should accept the findings of the California court "armed as it is with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 1], and familiar with the milieu in which that provision would operate. . . . "

B. An Inquiry Into Whether Intent To Discriminate Against A Racial Minority Was A Motivating Factor In Enactment Of Proposition 1 Is Unwarranted Because It Has No Disproportionate Impact On A Racial Minority

Petitioners appear to contend that because they feel strongly that a particular political issue which they associate with their racial identity can be resolved only one way, it should be immune from the political process even if their preferred resolution is not mandated by the United States Constitution. (Pets'. Br., pp. 71–80.) The rationale is that rejection of, or existence of the opportunity to reject, their political position is per se racial discrimination.

Where no obstacles have been raised to participation in the political process to achieve their objectives, which are not constitutionally mandated, inquiry into the motivations for disagreement are constitutionally unwarranted. In the context of reviewing a state reapportionment plan alleged to have been devised to achieve racial objectives, it was noted that an argument such as petitioners is constitutionally irrelevant (*United Jewish Organizations* v. *Carey, supra,* 430 U.S. at 166–167 (Opn. of White, J., announcing the Court's judgment)):

> " . . . as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race. Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did

not vote. Some candidate, along with his supporters, always loses. . . .

"Where it occurs, voting for or against a candidate because of his race is an unfortunate practice . . . However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process." (Citation omitted; n. omitted.)

Arlington Heights v. *Metropolitan Housing Corporation, supra,* 429 U.S. at 266 is consistent with the view expressed in *United Jewish Organizations;* it does not hold that an inquiry into whether invidious discriminatory purpose was a motivating factor is required where the burden of establishing disproportionate impact has not been met.

For the reasons set forth in part I it is clear that the Court of Appeal's conclusion of no disproportionate impact is correct. Thus, a searching inquiry to determine whether invidious purpose was a motivating factor in enacting Proposition 1 is unwarranted and irrelevant.

Moreover, even if such purpose had been found to be a motivating factor, the absence of a disproportionate impact and the overriding state interest which Proposition 1 is necessary to implement, demonstrate that it is consistent with the priorities of the Fourteenth Amendment and should be upheld.

CONCLUSION

The judgment of the California Court of Appeal, Second Appellate District, should be affirmed.

Respectfully submitted,
GEORGE DEUKMEJIAN
Attorney General

WILLARD A. SHANK
Chief Assistant Attorney General

RICHARD D. MARTLAND
Assistant Attorney General

GEOFFREY L. GRAYBILL
Deputy Attorney General

Counsel for State of California
as Amicus Curiae in Support of
Respondent